IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-920

JOSEPH ANUSZEWSKI AND RONALD GUTOWSKI,
*Petitioners,*

v.

DYNAMIC MARINERS CORP., PANAMA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Joseph Anuszewski and Ronald Gutowski, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 391 F. Supp. 1143 and the Order of the United States District Court dated March 13, 1975, entering judgment for the Defendant below, respondent herein, appears at page 20 of the Appendix hereto.*

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet officially reported and appears at App. 21. The Order of the United States Court of Appeals for the Fourth Circuit dated October 5th, 1976, denying Petitioners' Petition for Rehearing appears at App. 25.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit denying Petitioners' Petition for Rehearing was entered on October 5, 1976. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

1. Within the framework of the 1972 amendments to 33 U.S.C., § 901 et seq., Longshoremen's & Harborworkers' Compensation Act (LHWCA) does the vessel owner have a duty to take remedial measures to protect longshoremen-business invitees, where the vessel owner has continuing knowledge of a dangerous condition and where said dangerous condition is such that the vessel owner can reasonably anticipate the likelihood of said dangerous condition resulting in injury to the longshoremen?

2. Is the finding below that the vessel owner owes no duty to the longshoremen, as invitees of the vessel where the danger to them is open and obvious

* Pages of the Appendix are designated "App. (page nos.)."



tantamount to providing the vessel owner with a defense of voluntary assumption of risk which traditionally has not been available to the vessel owner in the American Maritime Court?

3. After having found that the Respondent (shipowner) was negligent in knowingly allowing the continuing violation of the safety regulation during the unloading operation pursuant to *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 665 (4th Cir. 1963), was it erroneous for the District Court to then find that the shipowner's negligence was not actionable?

4. Did the 1972 amendments to the LHWCA change the definition of negligence as pertaining to the vessel owner's duty to persons lawfully aboard the vessel (other than crew members) as defined by this Honorable Court in *Kermarec v. Compagnie Generale*, 358 U.S. 625 (1959)?

## STATUTORY PROVISIONS INVOLVED

1. Longshoremen's & Harborworker's Compensation Act as amended 33 U.S.C. § 905 (b):

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair

services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter.

2. Section 1504.43 (e) "Safety and Health Regulations for Longshoring, 29 C.F.R. Sec. 1918.43 (e) which provides as follows:

> (e) Any beam or pontoon left in place adjacent to a section through which cargo, dunnage, equipment or other material is being worked, shall be lashed, locked, or otherwise secured so that it cannot be displaced by accident. All portable, manually handled hatch covers, including those bound together to make a larger cover, shall be removed from any working section.

## STATEMENT OF THE CASE[1]

Petitioners Joseph Anuszewski and Ronald Gutowski, were injured on February 18th, 1973, while working aboard the vessel M/V Tarpona, a cargo vessel owned and operated by Dynamic Mariners Corp. That at the time of the injuries sustained by your Petitioners, they were employees of Nacirema Operating Company, a longshoring company working in the Port of Baltimore. That at the time of their injuries your Petitioners were longshoremen and members of a stevedoring gang employed by Nacirema Operating Company. The injuries to your Petitioners complained of occurred in the lower hold of the No. 1 hatch of the vessel M/V Tarpona. The cargo spaces in the vessel's No. 1 hatch consisted of an upper tween deck, lower tween deck and lower hold. At the upper and lower tween deck levels the hatch coverings consisted of hatch covers resting on four 20-foot beams weighing approximately one ton

[1] The following summary of facts has been extracted in part from the findings of facts as set forth in the opinions of the District Court below at App. 1 through 4.



each. These beams were equally spaced along the length of the hatch and each spanned the width of the hatch a distance of 20 feet and rested in slots built into the hatch combing on either side of the hatch. On February 17, 1973, the day before your Petitioners were injured, the same stevedoring gang including the Petitioners worked in the same hatch aboard the M/V Tarpona and on February 17th, in opening the hatch opening between the upper tween and lower tween deck in No. 1 hatch the stevedoring gang had removed all except one beam in the forward end of the hatch. This same procedure was carried out when the gang finished working the cargo in the lower tween deck and proceeded into the lower hold. Again, in opening the hatch between the lower tween deck and the lower hold, they removed all of the beams described above in that hatch opening with the exception of the beam most forward in the hatch. The beams aforementioned which spanned the hatch opening between the lower tween and lower hold, although equipped for locking devices consisting of pins similar to 6-inch threaded bolts and nuts, were not locked in the slots into which they fit nor were they otherwise secured in any manner. Neither the locking devices nor rope for lashing were in the immediate vicinity of the unsecured beams. The men of the stevedore gang working in No. 1 hatch, including the Petitioners, continued to work under and in the vicinity of the unsecured beam throughout February 17th and February 18th, 1973, until the time of the accident. The situation was not corrected and the forward beam in the lower tween deck was never secured in any manner.

On February 17th, 1973, the gang members discharged all of the cargo from the lower tween deck. Later the same day they proceeded to remove the hatch covers from the lower tween deck hatch square in order to discharge cargo from the lower hold. Again, there

were four beams spanning the hatch in place similarly unsecured in the slots in which they rested. The three aftermost beams were removed by the winchmen and the forward beam was left in place. The longshoremen then proceeded to discharge some of the cargo in the lower hold and completed the work that day.

On February 18th, 1973, the same gang of longshoremen including the Petitioners returned to the Tarpona and continued to discharge the cargo from the vessel's No. 1 lower hold. Work commenced at 8:00 a.m. and continued throughout the day until all cargo was discharged from the lower hold. In the meantime, however, at approximately 9:50 a.m., while the longshoremen including the Petitioners were working at a position in the lower hold almost directly under the forward beam that was still in place and approximately ten feet below it, and while a pallet was being discharged from the lower hold the cargo hook which was attached to the ship's gear caught beneath the forward beam that was still in place in the hatch opening, dislodged it by lifting it out of its socket, and caused it to drop approximately ten feet into the vessel's hold, striking the Petitioners Anuszewski and Gutowski (App. 2).

A crewman of the vessel who was present during the discharge operation described above for the purpose of preventing pilferage as well as one or more other members of the ship's crew, was in a position to see that the beams were unfastened (App. 3).

The appropriate practice while any cargo was being handled in a portion of a hatch below any beam of the type of the beams described herein was to have such beams secured through the use of the pins for which each beam was fitted or to have such beam otherwise secured. The failure to secure the beams during the unloading operation on February 17, 1973, and February 18, 1973, was in violation of Section 1504.43 (e) of



the Safety and Health Regulations for Longshoring, 29 C.F.R. Section 1918.43 (e) (App. 4).

A suit was instituted against Dynamic Mariners Corp. by Petitioners Joseph Anuszewski and Ronald Gutowski in the United States District Court for the District of Maryland. Jurisdiction was based on Admiralty and Maritime Jurisdiction pursuant to rule 9(h) of The Federal Rules of Civil Procedure. By pretrial arrangement, the case was bifurcated with all matters except primary negligence being reserved for later determination following a determination by the District Court on the issue of primary negligence on the part of the defendant, vessel owner. At the conclusion of the case, the Court entered judgment for the vessel owner finding that there had been a violation of the safety regulations for longshoring, that the vessel owner had knowledge of the violation of the safety regulations, and that the failure of the vessel to lock or fasten the beams constituted negligence on the part of the ship owner in accordance with *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 665 (4th Circuit, 1963). The court, however, went on to say, "but that negligence on the part of the ship is not actionable negligence in the post-1972 setting . . ." (App. 4).

From the Court's Order entering judgment for the Defendant, vessel owner, your Petitioners, Plaintiffs below, appealed to the United States Court of Appeals for the Fourth Circuit.

After submission of briefs, oral argument was held before the Court on December 2, 1975, and on September 8, 1976, the decision of the Lower Court was affirmed. Petitioners petitioned the United States Court of Appeals for the Fourth Circuit for Rehearing, which said Petition for Rehearing was denied by the Order of the Court dated October 5, 1976.

## REASONS FOR GRANTING THE WRIT

1. *The decision below directly conflicts with a recent decision of the United States Court of Appeals for the Second Circuit.*

Essentially the same legal issues were presented to the Court on Appeal in the case of *Antonio Napoli, v. Trans-Pacific Carriers Corp. and Universal Cargo Carriers, Inc., Hellenic Lines, Ltd.*, 536 F.2d 505 (United States Court of Appeals 2nd Circuit argued April 12, 1976, decided May 25, 1976).

The Fourth Circuit in the decision below indicated that where the dangerous condition which caused the injury was "open and obvious and apparent and known to the Plaintiffs" the right of the Plaintiffs to recover in negligence against the vessel owner for their injuries would be foreclosed, even though the vessel owner had continuing knowledge concurrent with the stevedoring company of the danger. In contrast, the Second Circuit in *Napoli, supra,* on page 508 said,

> "Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position to fully appreciate the risk or to avoid the danger even though aware of it."

In the instant case the Fourth Circuit placed great stress on land-based principles of negligence and found that under land-based law, the open and obvious concept would prevent recovery, whereas the Second Circuit in *Napoli, supra,* on page 508, stated as follows:

> "Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present day obligations owed by a landowner to one whom he invites upon his premises."

It is respectfully submitted that what is actually at stake transcends the resolution of the claims of the



Petitioners herein. The result of allowing the decision of the instant case to stand in the face of the decision of the Second Circuit in *Napoli, supra,* creates an obvious division of opinion as between the two circuits as to what constitutes the appropriate standard for determining negligence in matters such as these. The obvious problems resulting from this situation will be to allow a far more stringent test for negligence to exist in the Fourth Circuit than that which will exist in the Second Circuit. Besides the confusion in subsequent cases in other circuits citing as authority these two decisions, additional problems will result from the forum-shopping which will undoubtedly take place in that the legal principles most favorable to the Plaintiff will determine the forum in which the suit is brought. It is further urged that such a situation as created by dissimilar interpretations of the law between circuits is inconsistent with the intent of Congress as articulated in the committee reports** (App. 19). The committee stated as follows:

> "Finally, the committee does not intend that the negligence remedy authorized in the Bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal Law."

It is therefore respectfully urged that the committee intended that there be Federal Law rather than diversified state law and certainly the committee intended that the Federal Law be uniform in its application from circuit to circuit.

2. *The Appeals Court below misstated the facts upon which its decision was based.*

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** Applicable section of the Report of the Senate Committee and the House Committee (Apparently Identical) which accompanied the 1972 Amendments to the LHWCA was referred to in the District Court Opinion (App. 6) and included as an Appendix to said Opinion beginning at (App. 13) hereto.

While the District Court (App. 3) found that in terms of the knowledge of the crew members stationed to prevent pilferage, as well as the finding that one or more members of the ship's crew was in a position to see that the beam was unfastened, constituted continuing knowledge on the part of the ship concurrent with the continuing knowledge of the stevedoring company of the dangerous condition, the statement of facts upon which the Fourth Circuit based its decision completely eliminated any mention about continuing knowledge or continuing notice of the dangerous condition on the part of the vessel owner, its agents, servants and employees. The Fourth Circuit then applying the Restatement (Second) of Torts § 343 (1965) to the incomplete statement of facts arrived at an obviously erroneous conclusion. Clearly, the facts of this case if properly stated and applied within the framework even of the law recited by the Fourth Circuit, should have resulted in a determination of negligence against the vessel owner.

3. *The decision below undermines the stated objectives of the committee that drafted the legislation (LHWCA as amended) with regard to the concern of the committee that the legislation not reduce compliance with appropriate safety regulations.*

The committee which drafted the legislation articulated its concern for the safety of longshoremen working within the industry, and particularly articulated its intentions that the amendments to the act not relieve the vessel of its obligations and duties under the appropriate safety and health regulations. The Honorable Court's attention is invited to the words of the committee:

> "Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other person from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety." (App. 19)



The concern for safety of workmen has been articulated in other cases throughout the country demonstrating a growing concern for the safety of workmen in hazardous industries. The Court's attention is invited to the case of *Dunn v. Brimer*, 537 S.W.2d 164 (A.R.K. No. 76-33, June 7, 1976).

The Court's attention is also invited to the case of *Arthur v. Flota Mercante Gran Centro Americana S.A.* 487 F.2d 561 (5 Cir. 1973) which specifically articulated the Court's concern that appropriate safety regulations be enforced when the Court stated the following at page 564:

> "Significantly, the purpose of these regulations is to promote safety in the industry and establish an unambiguous standard for measuring industrial safety as it relates to longshoremen, harbor workers or other business invitees that come into contact with the vessel. That purpose is advanced when the court instructs the jury as it did in this case. We hold that if the *Marshall* criteria are met, the court may instruct the jury that a violation of the Safety and Health Regulations is negligence per se."

It would appear that the determination of the Fourth Circuit in the instant case if allowed to stand would allow the vessel owner to totally ignore any efforts towards the enforcement of safety and health regulations. It would impose, therefore, no responsibility on the vessel owner to make any effort toward correcting a

violation of the safety regulations and would allow the vessel owner to remain passive in the face of a known and continuing violation of the safety regulations.

4. *The decision of the United States Court of Appeals for the Fourth Circuit in the instant case when read in concert with the fact of continuing notice on the part of the defendant shipowner resulted in a determination of law by said Court which was contrary to that Court's own guidelines established in Bess v. Agromar Line*, 518 F.2d 738 (4th Cir. 1975).

The District Court below found under the test of *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir., 1963) that the vessel owner, defendent below, was negligent. However, the Court below indicated that this negligence was not actionable under the 1972 amendments to the LHWCA. The implication would be that the negligence in the *Provenza* case was a different brand of negligence than anticipated by the amendments to the LHWCA.

However, the United States Court of Appeals for the Fourth Circuit in the *Bess* case said:

> "The distinction between the proof necessary to sustain a recovery under the doctrine of seaworthiness and the proof necessary to sustain a recovery under the concept of negligence was discussed in *Boleski v. American Export Lines, Inc.* 385 F.2d 69, 73-74 (4th Cir. 1967)." *Supra* at n. 5. at 740.

The Court in *Bess* continued to say in the same footnote:

> ". . . To the extent that Boleski discussed the liability of the shipowner under negligence principles it remains pertinent despite the 1972 Amendments to the Act."

Interestingly, it should be emphasized that the *Boleski* case was a pre-1972 case, thus indicating that the negligence in the pre-1972 era is the same as in the post-1972 era.



5. *The opinion of the Court of Appeals for the Fourth Circuit in the instant case fails to conform to the principles announced by the drafters of the Amendments to the LHWCA.*

The drafters of the Amendments to the legislation, in order to clearly indicate their intentions, offered the following example of what would constitute negligence against the vessel (App. 17) and is quoted as follows:

> "So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to § 5 would still permit an action against the vessel for negligence. To recover, he must establish that:
>
> "1. The vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or
>
> "2. the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances." S. Rep. No. 92-1125 at 10-11.

The facts of this case further indicate that for a period of two days the crew of the vessel were aware of the danger to longshoremen created by the continuing violation of the safety regulation and that for a two-day period, they (ship's crew) failed to correct or alleviate the dangerous condition. Certainly the failure to act over a two-day period in the face of the danger of an unsecured beam is no less negligent than allowing a foreign substance to remain on a deck for a period of time, and certainly if the shipowner, according to the drafters of the legislation, was obliged to exercise reasonable care to discover the danger (of a slippery condition) and to remove it, it most certainly would have been under the same duty to exercise reasonable care when it already knew of the danger, to at least act

in some remedial manner to correct the dangerous condition in the instant case.

Obviously, an unsecured beam weighing approximately one ton, suspended ten (10) feet above the Longshoremen, presents a far greater hazard than a slippery deck and should therefore impose a greater duty on the vessel owner.

6. *The opinion rendered by the United States Court of Appeals for the Fourth Circuit in the instant case provides the defense of voluntary assumption of risk to the vessel that traditionally has not been available to him in the American Maritime Court. The creation of this new defense is inconsistent with the intention of the 1972 Amendments to the LHWCA.*

The Appeals Court (4th Circuit) at App. 24 stated as follows:

> "Properly viewing the longshoremen as invitees of the vessel, the court [meaning the Court below] concluded that 'this case presents a fact situation in which the danger was open, obvious, apparent and known to plaintiffs,' [footnote omitted] and it was on this basis that judgment was rendered in favor of the defendant vessel."

It would appear by this language that the Fourth Circuit has created a new legal principle in maritime personal injury whereby the longshoreman would be prevented from asserting a negligence claim if he has been obliged by his duty to work in the vicinity of an open and obvious danger. Such a finding would be tantamount to recreating the defense of assumption of risk in a maritime negligence claim. Vessel owners have long been prevented from utilizing the doctrine of assumption of risk in maritime personal injury suits brought by both longshoremen and seamen. To recreate the defense by the language of this case would create a legal precedent not only inconsistent with but directly in opposition to the precise intention of the drafters of the



1972 Amendments to the legislation which provided as follows (App. 19):

> ". . . Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." S. Rep. No. 92-1125 at 12.

7. *The decisions below are inconsistent with the principles announced in this Honorable Court's decision in Kermarec v. Compagnie Generale,* 358 U.S. 625 (1959).

Here, the question of negligence in a pre-1972 setting became pertinent in that the Plaintiff, though injured aboard the Defendant's vessel, was not one within the class entitled to the warranty of seaworthiness. Consequently, the Plaintiff therein could only recover against the vessel owner under a negligence theory.

The implications of the above decision were cogently summarized by Professor of Law David W. Robertson of the University of Texas in an April, 1976 article in the *Journal of Maritime Law and Commerce.*

> "Finally, it is pertinent that in 1959 the Supreme Court in *Kermarec v. Compagnie Generale Transatlantique,* upholding recovery by a plaintiff who would have been a "bare licensee" at common law, rejected the common law's traditional ranking of premises visitors as inappropriate for the maritime law. It is possible to view that decision as a Supreme Court mandate for a unitary maritime standard of care, amounting to a full-blown duty to exercise reasonable care to maintain safe conditions aboard ship for all those lawfully present there."

## CONCLUSION

WHEREFORE, for the reasons above stated, the Petitioners respectfully submit that a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX

*In The United States District Court*
*For The District of Maryland*

*Civil No. 73-1220-K*

*Joseph Aneszewski, et al.*
*v.*
*Dynamic Mariners Corp. Panama*

OPINION OF THE COURT

(Filed: March 13, 1975)

Bernard J. Sevel, of Baltimore, Maryland, for Plaintiffs.

Randall C. Coleman and Ober, Grimes & Shriver, of Baltimore, Maryland, for Defendant.

Kaufman, District Judge.

In this case which has been tried non-jury before this Court two plaintiffs seek damages resulting from injuries sustained by each of them while working as longshoremen aboard a vessel docked in the Baltimore, Maryland area. Their claims raise questions of the meaning and application of one of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. That amendment is set forth in 33 U.S.C. § 905(b).[1]

*Findings of Fact and Holdings*

The accident in question occurred in the lower hold of the No. 1 hatch. The vessel arrived in Baltimore from New York after there discharging all cargo from the upper tween deck of No. 1 hatch. In the lower tween deck and the lower hold of No. 1 hatch was Baltimore

[1] That subsection, added to the Act by the 1972 amendments, is set forth in full *infra* in the body of this opinion.

cargo. A gang carrier and 23 men employed by the Nacirema Operating Co., Inc., a stevedoring company which had no connection with the prior discharge of cargo in the New York area from the upper tween deck of No. 1 hatch or from any other part of the vessel, came aboard the ship on February 17, 1973 at 8:00 a.m. and commenced work, including the removal of the hatch covers between the upper tween and the lower tween deck of No. 1 hatch. Later in the day of February 17, 1973, after the lower tween deck had been unloaded, the hatch cover between the lower tween deck and the lower hold of No. 1 hatch was removed by the longshoremen. The hatch cover over the lower tween deck, and the hatch cover between the lower tween deck and the lower hold and covering the latter, were each supported by four beams. The three aftermost beams below each such cover were removed by the gang after each such hatch cover was lifted during their work on February 17th, but the forward of the four beams below each such cover was left in place.

On February 17, 1973, the gang members discharged all of the cargo from the lower tween deck and some of the cargo from the lower hold. On February 18, 1973, they completed discharge from the lower hold. The plaintiffs were injured on February 18, 1973 during the unloading of the lower hold when the forward of the four beams, above the lower hold and which, when it was in place, supported the hatch cover over the lower hold, was dislodged by a cargo hook. That hook, during the discharge operation on February 18th, became caught under the beam, lifted the beam out of its socket and dropped it into the lower hold where it fell upon plaintiffs who were at work there.

When the gang removed the hatch covers over the lower tween deck and later over the lower hold, they found that all of the pins which held those eight beams in place were missing and that none of the eight beams was locked in place or otherwise secured by rope or other means. The lack of such locking or fastening of the beams over the lower tween deck was noted by and discussed among members of the gang when they removed the hatch cover over the lower tween deck about the time they commenced their work on February



17th. The foreman of the gang told its members to work and that the situation would be corrected. The men continued to work on February 17th and 18th but the situation was not corrected.

The weather on the two days was cold and there was not the maneuverability that would have existed on other than a cold day. However, the boom to which the hoist was attached could have been respotted at one or more times on February 17th and 18th to make it more probable that first one, and then two, of the eight beams would not be dislodged. While the evidence does not establish that respotting of the boom would have necessarily avoided the accident, respotting might have decreased the chances of the accident occurring. Further, in any event the evidence does establish that there was room to place on the weather deck the two forward beams, which were under the hatches covering the lower tween deck and the lower hold, if those two beams had been removed as were the other two respective groups of three beams each. Further, the evidence additionally establishes that there was also available at a Nacirema supply office, within a half block of the spot at which the vessel was docked, rope and probably also nuts and bolts, which could have been used to fasten the two forward beams in place in lieu of their removal or in lieu of their being left in place without fastening. In sum, there was negligence on the part of Nacirema in not achieving rather easily a condition of safety. That failure would seemingly have been obviated (a) if Nacirema had provided, as it did not, a safety man aboard ship on February 17th and 18th and if that safety man had performed his job, and (b) even without the safety man, if the gang leader had obtained rope or some other items from the Nacirema supply office and secured the beams, or had required the fastening or the removal of even just the forward beam covering the lower hold of No. 1 hatch.

A crewman of the vessel who was present during the discharge described above for the purpose of preventing pilferage, as well as one or more other members of the ship's crew, was in a position to see that the beams were unfastened. However, there is no evidence that

any crewman was at any time asked by anyone employed by Nacirema to correct the situation. There were on hand in a nearby chain locker of the ship items which could have been used to fasten the beams left in place, but no one requested that such items be utilized.

The appropriate practice while any cargo was being handled in a portion of a hatch below any beam of the type of the eight beams in question was to have such beam secured through the use of the pins for which each such beam was fitted, or to have such beam otherwise secured. The failure to secure the two beams during the unloading operation on February 17, 1973 and February 18, 1973 was in violation of section 1504.43(e) of the Safety and Health Regulations for Longshoring, 29 C.F.R. § 1918.43(e).[2] While the primary duty under that regulation to make certain that the beams left in place during the unloading operation was upon the stevedore,[3] the failure of the vessel to lock or fasten the beams constituted negligence on the part of the shipowner since the shipowner, at least in terms of knowledge of the crew member stationed to prevent pilferage, and in terms of those responsible for handling the ship from the time of its departure from New York, knew or should have known of the violation of the safety regulation. *Provenza v. American Export Lines, Inc.* 324 F.2d 660, 665 (4th Cir. 1963). But that negligence on the part of the ship is not actionable negligence in a post-1972 setting, for reasons which are discussed *infra.*

The longshoremen removed all of the unlocked beams except two. The presence of the forward beam left in place above the lower tween deck has not been proven

[2] That regulation provides as follows:

> (e) Any beam or pontoon left in place adjacent to a section through which cargo, dunnage, equipment, or other material is being worked, shall be lashed, locked, or otherwise secured so that it cannot be displaced by accident. All portable, manually handled hatch covers, including those bound together to make a larger cover, shall be removed from any working section.

[3] *See* 33 U.S.C. §v902(3) and (4), 941(a); and 29 C.F.R.§§ 1918.2 and .3.



by plaintiffs to have contributed to the accident, that is, there is no evidence that if the forward beam above the lower tween deck had not been in place, the boom would have been operated so as to have avoided the cargo hook having become attached to the forward beam above the lower hold. By way of contrast, of course, it is clear that the accident would not have occurred except for the presence of the forward beam above the lower hold. But that presence could have been eliminated by removal or fastening of that beam by the stevedore on February 17th or before the accident on February 18th. Instead, the stevedore company negligently left that beam in place and unsecured.

The issue in this case is whether the ship's continuing failure up to and including the moment of the accident to take steps to correct the condition which existed after one or both of the forward beams was left in place and unsecured renders the ship liable to plaintiffs. Before the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, that condition itself would seemingly have constituted unseaworthiness. But unseaworthiness has been eliminated as a remedy for longshoremen by the addition in 1972 of what is presently codified as 33 U.S.C. §905(b) of that Act. That subsection provides as follows:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship

> building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

The applicable section of the Report of the House Committee on Education and Labor, No. 92-1441, 92d Cong., 2d Sess., prepared in connection with the 1972 amendments is set forth in 3 U. S. CODE CONG. & ADMIN. NEWS 4701-05 (1972), and is appended to this opinion.[4] It speaks clearly for itself, and establishes that land-based principles of law apply to longshoremen's claims for damages against third parties and that a ship has no different liability to longshoremen employed to work aboard it by a stevedoring company than the owner of land-based property owes to the employees of an independent contractor who perform work on that property. And the post-1972 amendment cases in the federal courts decided to date and involving longshoremen's claims against ships have adopted that approach.[5] Accordingly, a look at the established principles of negligence tort law is required. In that regard the House Committee Report, 3 U. S. CODE CONG. & ADMIN. NEWS, *supra* at 4705, provides that in cases such as this one the federal courts are to formulate uniform federal law and not to apply differing state law principles on the basis of location of the port in which an accident occurred.

[4] The Report of the Senate Committee on Labor and Public Welfare apparently is identical to the House Report. S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972).

[5] Ramirez, et al. v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974); Shellman v. United States Lines Operators, Inc., Civil No. CV 73-1902-R (C.D. Cal. filed Nov. 21, 1974); Citizen v. M/V TRITON, 384 F. Supp. 198 (E.D. Tex. 1974); Slaughter v. S.S. RONDE, Civil No. 3151 (S.D. Ga. filed Sept. 11, 1974); Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974); Lucas v. "Brinknes" Schiffahrts-Ges., 379 F. Supp. 759 (E.D. Pa. 1974); Fedison v. The Vessel WISLICA, 382 F. Supp. 4 (E.D. La. 1974); Hite v. Maritime Overseas Corp., 375 F. Supp. 233 (E.D. Tex. 1974).



RESTATEMENT (SECOND) OF TORTS §343 (1965) provides:

> § 343. Dangerous Conditions Known to or Discoverable by Possessor
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Comment a thereto provides that section 343 "should be read together with" section 343A which "limits the liability" stated in section 343. Section 343A(1)[6] states:

> § 343A. Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Employees of independent contractors doing work on property of the owner are invitees of the latter. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §61, at 385-86 (4th Ed. 1970). But the owner is not liable

> * * * for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. * * *
>
> Likewise, in the usual case, there is no obligation to protect the invitee against dangers which are

[6] Subsection (2) of section 343A deals with public land or public utilities and has no applicability in this case.

known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Against such conditions it may normally be expected that the visitor will protect himself. It is for this reason that it is so frequently held that reasonable care requires nothing more than a warning of the danger. But this is certainly not a fixed rule, and all of the circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted, as by goods on display, or that after lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it. It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough. It is generally agreed that the obligation as to the condition of the premises is of such importance that it cannot be delegated, and that the occupier will be liable for the negligence of an independent contractor to whom he entrusts maintenance and repair.

In particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm from the negligence of contractors and concessionaires as to activities



on the land, as well as that of other persons who have entered it, or even from intentional attacks on the part of such third persons. But he is required to take action only when he has reason to believe, from what he has observed or from past experience, that the conduct of the other will be dangerous to the invitee. Again, in the usual case, a warning will be a sufficient precaution, unless it is apparent that, either because of lack of time or by reason of the character of the conduct to be expected on the part of the third person, it will not be effective to give protection. [*Id.* at 393-95; footnotes omitted.]

It is possible to argue that the plaintiffs and their fellow longshoremen forgot on February 18th the existence of the unfastened beam above the lower hold. But the presence of the unfastened beam was a most evident and continuing condition which may have been largely ignored by the longshoremen but hardly entirely forgotten particularly since the boom operator and those aiding him by comments had to lower the cargo hook down and up past the offending beam. Thus, this case presents a fact situation in which the danger was open, obvious, apparent and known to plaintiffs. Accordingly, RESTATEMENT § 343(b), *supra*, would appear to provide liability only if the person contracting with the independent contractor (*i.e.*, in the context of this case, the shipowner contracting with the stevedore) "should expect that [his invitees] . . . will not discover or realize the danger, or will fail to protect themselves against it * * *". In this case the plaintiffs and the members of their gang did discover and realize the danger. Further, the shipowner could reasonably have expected that the longshoremen would have discovered the unsecured beams and would have protected themselves by removing all of those beams or by fastening them. This is not a case like that set forth in illustration 5, RESTATEMENT § 343A, *supra*, in which a person employed in an office located in an office building slipped "over a slippery waxed stairway, whose condition is visible and quite obvious" and upon which she walked because "[h]er only alternative to

taking the risk was to forgo her employment." In that situation the RESTATEMENT would permit that injured person to recover in a negligence action against the office building owner. By way of contrast, the two plaintiffs in this case were in no such similar position. Nor would they seem within the approach suggested in 2 F. HARPER AND F. JAMES, THE LAW OF TORTS § 27.13 (1956) — an approach seemingly somewhat more advantageous to a plaintiff than the approaches of either the RESTATEMENT or of Professor Prosser — to have been subjected to a "condition *unreasonably* dangerous" (§ 27.13 at 1490; emphasis in original). Thus, regardless of whether the duty upon a person who "employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken," RESTATEMENT, *supra* at § 413, is or is not a type of duty owed to employees of independent contractors who work on the premises, the defendant shipowner is not liable in this case. In passing, however, it is noted that there is a conflict among the jurisdictions as to whether the "peculiar risk" doctrine does or does not apply to such employees.[7] Even if that doctrine does so apply, there is authority that it only applies if it is the *work*, not the negligent condition, which poses the "peculiar risk".[8] Herein if there was a "peculiar risk", it was posed not by the nature of the unloading duties, *i.e.*, not by the work but by the beam, *i.e.*, the offending condition. But herein it is not necessary to reach the

[7] *Compare, e.g.*, Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970), and Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965), stating that employees of independent contractors are not "others" as that term is used in the RESTATEMENT, *supra*, §§ 416-29, *with* Person v. Cauldwell-Wingate Co., 176 F.2d 237, 240 (2d Cir.) (L. Hand, C.J.), *cert. denied*, 338 U.S. 886 (1949), and Woolen v. Aerojet General Corp., 57 Cal.2d 407, 369 P.2d 708 (1962), stating that employees of independent contractors are "others" as that term is used in RESTATEMENT, *supra*, §§ 416-29.

[8] *See, e.g.*, Cutlip v. Luckey Stores, Inc., et al., 22 Md. App. 673, 684-86 (1974).



issues involved in the applicability *vel non* of the "peculiar risk" doctrine because in the context of the facts in this case settled principles of land-based tort law do not impose liability in favor of the employees of an independent contractor for the open and obvious negligence of the person in control of the premises upon which those employees are at work.

Nevertheless, plaintiffs herein contend, *inter alia*, that the following paragraphs in the House Committee report (3 U.S. CODE CONG. & ADMIN. NEWS, *supra* at 4704) entitle them to recover herein:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

It is true that the words following "2" in the next to the last sentence of that quotation, standing by themselves and preceded by the word "or", not "and", may well at first blush appear to entitle plaintiff to recovery herein. The ship had the opportunity after the lower hold hatch

cover was removed on February 17, 1975 to discover and to rectify the condition of the beam which was a proximate cause of the accident on February 18th. But it would not seem that the ship or its officers or crew acting in the exercise of reasonable care should have believed it was incumbent upon the ship under the circumstances to remove or fasten a beam (a) which the longshoremen could have removed at any time as they did its three companion (and six out of a total of eight) beams, or (b) which the longshoremen could have secured or fastened. Moreover, the House Report calls specifically for longshoremen to be placed vis a vis shipowners in the same position as their land-based counterparts are placed toward land-based property owners (*id.* at 4702, 4703, 4704, 4705). And the paragraph (at 4704) directly after the above quoted two paragraphs includes this observation:

> Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation — just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

If the plaintiffs herein can recover, then the door will be wide open for longshoremen to recover for shipowners' negligence on a basis that is not available against land or building owners to employees of independent contractors who do work on such land and/or in such buildings. While that result would not offend the



elimination by the Congress in 1972 of the principle of unseaworthiness as a remedy against the ship by a longshoreman, it would negate the repeated insistence in the House Report concerning the applicability of principles of land-based tort law. In that context, the possible or literal word-for-word application of one illustration in the House Report may not prevail. Accordingly, judgment is today being entered herein for defendant.

FRANK A. KAUFMAN,
United States District Judge.

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## APPENDIX

### ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping*

*Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it. Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124[2] (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits



payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to the longshoremen and other non-seamen working on board a vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of

protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "nondelegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, *Crumedy v. The J. H. Fisser,* 358 U.S. 423, *Albanese v. Matts,* 382 U.S. 283, *Skibinski v. Waterman SS Corp.,* 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, *A. N. G. Stevedores v. Ellerman Lines,* 369 U.S. 355, *Blassingill v. Waterman SS Corp.,* 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson,* 347 U.S. 396, *Italia Societa v. Oregon Stevedoring Co.,* U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.



Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation — just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker

where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. SS Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed



directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety.

*In The United States District Court*
*For The District of Maryland*

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*Civil No. 73-1220-K*

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*Joseph Aneszewski, et al.*

*v.*

*Dynamic Mariners Corp. Panama*

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ORDER

For the reasons previously set forth on the record in open Court by this Court and also set forth in an opinion of even date herewith filed herein, judgment is hereby entered for defendant, plaintiffs to pay the costs of this case. It is so ORDERED, this 13th day of March, 1975.

FRANK A. KAUFMAN,
United States District Judge.



*In The United States Court of Appeals*
*For The Fourth Circuit*

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*No. 75-1575*

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*Joseph Anuszewski and Ronald Gutowski,*
*Appellants,*

*v.*

*Dynamic Mariners Corp., Panama,*
*Appellee.*

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

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Argued December 2, 1975 Decided Sept. 8, 1976

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Before HAYNSWORTH, Chief Judge; WINTER, Circuit Judge, and FIELD, Senior Circuit Judge.

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PER CURIAM:

Joseph Anuszewski and Ronald Gutowski brought this action against Dynamic Mariners Corp., Panama, (Dynamic) to recover damages for injuries sustained by them while working as longshoremen aboard a vessel owned by the defendant. The claims of the plaintiffs presented questions of the interpretation and application of 33 U.S.C. §905(b), one of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, and the district court, after a non-jury trial, entered judgment in favor of the defendant. The plaintiffs have appealed.

Anuszewski and Gutowski were longshoremen employed by the stevedoring company, Nacirema Operat-

ing Co., Inc., which had been hired to offloading Dynamic's vessel, the MS TARPONA. The offloading began on February 17, 1973, and continued through the following day. The hatch covers on the vessel were each supported by four beams which were normally locked into place by a series of pins but which were unsecured on this occasion. The longshoremen discovered the condition on February 17, 1976, and reported it to their foreman who directed them to continue their work, stating that it would be corrected. The men continued to work but the situation was not corrected. In order to offload the cargo area three of the four beams under each hatch were removed by the longshoremen but the fourth was left in place but unsecured. On February 18th, while the cargo from the lower hold was being discharged the cargo boom dislodged the beam under the lower hold hatch causing it to fall into the lower hold striking and injuring Anuszewski and Gutowski.

While recognizing that the condition of the beams constituted unseaworthiness, the district judge in his opinion[1] pointed out that such a remedy was no longer available to longshoremen under the 1972 Amendment. He further concluded that Section 905(b), when read in the light of the relevant legislative history, requires that land-based principles of law apply to a longshoreman's claims for damages, and that the liability of a ship to longshoremen employed to work aboard it by a stevedoring company is no different from that of the owner of landbased property to the employees of an independent contractor employed to perform work on such property.

The legislative history clearly supports the conclusion of the district court that the 1972 Amendments eliminated the absolute and non-delegable duty of a vessel to provide longshoremen a safe place to work. On this point the House Report states:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not

1. *Anuszewski v. Dynamic Mariners Corp. Panama*, 391 F. Supp. 1143 (D. Md. 1975).



> to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness' 'non-delegable duty', or the like."[2]

It is equally clear from the Report that while longshoremen retain the right to recover damages for negligence against a vessel, in such an action they occupy the same position as their land-based counterparts. Such intendment is manifest in the following language:

> "Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation — just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land based third party in non-maritime pursuits liable under similar circumstances."[3]

These conclusions of the district court upon the elimination of the unseaworthiness remedy, as well as the land-based standard to be applied, are in accord with the decisions of the several courts who have had occasion to consider the 1973 Amendments. *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975); *Slaughter v. Ronde*, 390 F. Supp. 637 (S.D. Ga. 1974), *aff'd.* 509 F.2d 973 (5 Cir. 1975); *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644 (N.D. Cal. 1974); *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974). In the last cited case this reading of the legislative purpose was succinctly stated:

> "In providing for the third-party suit against the vessel for its negligence, Congress perceived that it

2. H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. (1972), 2 U.S. Code Cong. & Admin. News., p. 4703.

3 *Id.*, at 4704.

was eliminating the large number of cases in which the vessel was held liable without fault pursuant to the doctrine of seaworthiness. This perception was based on the assumption that the negligence remedy provided would be similar to the common law concept based on fault and not any maritime negligence concept in which the vessel owed some special duty to provide the longshoreman a safe place to work." 379 F. Supp., *supra*, at 767.

In the present case, the district court further recognized the Congressional intent "that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law,"[4] and elected to follow the standard of the Restatement (Second) of Torts, §343 (1965), which provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger."

Properly viewing the longshoremen as invitees of the vessel, the court concluded that "this case presents a fact situation in which the danger was open, obvious, apparent and known to plaintiffs,"[5] and it was on this basis that judgment was rendered in favor of the defendant vessel. In our opinion the court's choice of the *Restatement* standard was appropriate, and its ultimate finding and conclusion upon the issue of liability is amply supported by the record.

[4] See H. R. Rep. No. 92-1441, note 2, *supra*, at 4705.

[5] 391 F. Supp. 1143, 1148, note 1, *supra*.



Accordingly, the judgment of the district court is affirmed.

*Affirmed.*

## ORDER OF COURT

*United States Court of Appeals*
*For the Fourth Circuit*

*No. 75-1575*

*Joseph Anuszewski and Ronald Gutowski,*
*Appellants,*

*And*

*Liberty Mutual Insurance Company,*
*Plaintiff,*

*v.*

*Dynamic Mariners Corp., Panama,*
*Appellee.*

Appeal from the United States District Court for the District of Maryland, at Baltimore

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is denied.

For the Court — By Direction

/s/ WILLIAM K. SLATE, II,
Clerk.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

## No. 76-920

JOSEPH ANUSZEWSKI AND RONALD GUTOWSKI,
*Petitioners,*

v.

DYNAMIC MARINERS CORP., PANAMA,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 1, 1977

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## No. 76-920

JOSEPH ANUSZEWSKI AND RONALD GUTOWSKI,
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v.

DYNAMIC MARINERS CORP., PANAMA,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## QUESTION PRESENTED

Were the decisions of the district court and court of appeals below applying land-based standards consistent with the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 *et seq.* (1976 Supp.) (hereafter Longshoremen's Act)?

## STATEMENT OF THE CASE

There are numerous factual omissions in Petitioners' Statement of the Case. They are particularly significant because each of them was specifically referred to by the district judge below and, coupled with current land-based negligence standards, formed the basis for his carefully reasoned opinion which was affirmed, *per curiam,* by the Court of Appeals for the Fourth Circuit.

In the court below, there was an agreed Statement of Facts contained in Appellants' (Petitioners' herein) brief. For convenience, that agreed statement is contained in full in Respondent's Appendix to this brief (Res. App. 1a, *et seq.*)*, but only the pertinent factual omissions will be referred to hereafter together with references both to the Agreed Statement of Facts and the opinion of the learned district judge.

Petitioners correctly state that during the discharge of the TARPONA a member of the vessel's crew was present "for the purpose of preventing pilferage" and that one or more other members of the crew were "in a position to see that the beams were unfastened." Br. 6. Petitioners, however, failed to state that on the first day of discharging the vessel, February 17, the longshoremen had not only observed and discussed among themselves the absence of any means of securing the beams in place but had, in fact, complained to their gang carrier and their foreman, both of whom were employees of the stevedoring company. The stevedoring company's safety man was not aboard the vessel. If he had been, and had performed his job, the failure to achieve a condition of safety "would seemingly have been obviated." Res. App. 3a; Dist. Ct. Op., Pet. App. 2a, 3a.**

* References to Respondent's Appendix are designated "Res. App. (page nos.)."

** References to District Judge Kaufman's opinion below, reproduced in Petitioners' Appendix, are designated "Pet. App. (page nos.)."



Following the complaints to their gang carrier and foreman, the longshoremen were told by their foreman to continue to work and that the situation would be corrected. In fact, the situation was not corrected either on the first day of work, February 17, or on February 18 through the time of the accident. Res. App. 3a; Pet. App. 3a.

Within a half block of the vessel, there was a gear locker belonging to the stevedoring company which contained rope and probably nuts and bolts which could have been obtained for use in securing the beams in place. Moreover, on the vessel itself there was a nearby chain locker containing items which could have been used to secure the beams in place. Res. App. 4a; Pet. App. 3a, 4a.

Finally, no one from the vessel was asked to correct the situation. Res. App. 4a; Pet. App. 3a, 4a.

## ARGUMENT

Hereafter, Respondent will reply directly to the arguments advanced by the Petitioners commencing with the heading "Reasons for Granting the Writ" (Br. 8), adopting, for convenience, the same numerical order used by Petitioners.

### 1. THE DECISION BELOW IS NOT IN CONFLICT WITH *NAPOLI v. [TRANSPACIFIC CARRIERS, ETC.] HELLENIC LINES,* 536 F.2d 505 (2d CIR. 1976).

In relying on an alleged conflict between the decision below in the case at bar and *Napoli,* Petitioners have ignored the fundamental difference in the underlying facts. In this case, Anuszewski and Gutowski were longshoremen working for an independent stevedoring company. In *Napoli,* the injured longshoreman was an employee of the vessel owner, Hellenic Lines, which acted as its own stevedore. The Second Circuit, following *Reed v. The YAKA,* 373 U.S. 410 (1963), correctly held that he was nevertheless entitled to bring

a third-party claim against his employer pursuant to the 1972 Amendments to the Longshoremen's Act.

Petitioners, however, maintain the following language from *Napoli* is in conflict with the Fourth Circuit's decision herein:

> Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present-day obligations owed by a landowner to one whom he invites upon his premises.

Br. 8; 536 F.2d at 508. But the crux of the *Napoli* decision reversing the district court is contained in the sentence omitted from the Petitioners' brief which immediately precedes the language relied upon:

> However, a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" *is clearly inappropriate where the shipowner, itself, is the stevedore.*

536 F.2d at 508 (emphasis added). Thus, *Napoli* was not intended to apply to situations in which the shipowner and stevedore are *separate* parties, as in the instant case.

Apart from this fundamental distinction which accounts for any seeming conflict between the Fourth Circuit's decision below and the Second Circuit's decision in *Napoli,* the injuries in the two cases arose under significantly different circumstances. Napoli, a deckman, was injured when he fell from some unsecured plywood boards resting on top of a deck load of drums, upon which he was obliged to stand to perform his duties. There was snow both on top of and beneath the plywood. The evidence was conflicting as to whether he slipped on the plywood or the plywood slipped on the drums, and whether the plywood had been placed on the drums by the ship's crew or by the longshoremen.



The Second Circuit reversed a jury verdict for the defendant because of error in the following portion of the jury charge:

> "There is no duty on the part of the ship owner to give the longshoremen notice of an obvious danger, or of a danger which would have been apparent to a reasonably prudent person exercising ordinary care under the circumstances shown by the evidence in the case."
>
> . . . . .
>
> "Now, if you find that the condition complained of by the plaintiff, that is permitting snow to accumulate under the plywood which caused the plywood to slip out from under him was known to the stevedore or to any of its employees, including the plaintiff, or if this should have been observed, then the ship owner owes no responsibility to warn a longshoreman of the open condition. If you find such then you can not find that the defendant was negligent and you must return a verdict for the defendant."

*Id.* at 507-08.

In commenting upon the portion of the jury charge it considered erroneous, the Second Circuit noted it was obviously the intent of the district court "to instruct the jury in accordance with the traditional rule of land-based negligence which is in substance that there is no obligation to warn an invitee of dangers which are known to him or which are so obvious that he may reasonably be expected to discover them himself." *Id.* at 508. The Second Circuit then cited with approval Dean Prosser[1] as well as earlier district court opinions properly applying the rule. Thus, it approved the same

[1] W. Prosser, *The Law of Torts* § 78, at 459 (2d ed. 1955). While numbered differently from the current citation, § 61 (4th ed. 1971), employed by District Judge Kaufman in the case at bar, both sections concern the duty owed by owners and occupiers of land to invitees. The newer edition, while consistent with the older one, contains a more extensive discussion of the care required.

land-based standards first applied by the Fourth Circuit in *Bess v. Agromar Line*, 518 F.2d 738, 741 (4th Cir. 1975), and later applied by the same court in the instant litigation. Pet. App. 23a.

But Petitioners maintain that *Napoli* conflicts with the opinion below and in support of their contention rely upon the following language:

> Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he *may not be in a position fully to appreciate the risk or to avoid the danger* even though aware of it.

536 F.2d at 508; Br. 9 (emphasis Respondent's). It is apparent from this language that the Second Circuit concluded the injured longshoreman was in no position either to appreciate the risk or avoid the danger which brought about his injury. This is fortified by its recitation of the particular factual situation with which it was faced in *Napoli:*

> In the present case, there was evidence from which a jury might conclude that the ship should reasonably have anticipated that Napoli would not be able to avoid the danger despite its obviousness. The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen.

536 F.2d at 509. Such cannot be said of the Petitioners. The undisputed facts upon which the district court below based its finding in Respondent's favor are that:

(1) Petitioners and their fellow workers were fully aware of the unsecured beams from the day before their accident through the time of the accident itself and had complained to their superiors. Pet. App. 2a, 3a. Clearly, they *were* "in a position fully to appreciate the risk or to avoid the danger . . . ." 536 F.2d at 508;



(2) Stevedoring personnel were responsible for removing beams, not ship's personnel, and the decision to leave an unsecured beam in place was that of the stevedore. Pet. App. 2a;

(3) Items which could have been used to secure the beams were readily available aboard the vessel in a nearby chain locker, or in a gear locker belonging to the stevedoring company only a half block away. Pet. App. 3a; and

(4) The condition complained of could have been eliminated by the removal or securing of the beam by the stevedoring company. Pet. App. 5a.

The district court below, on the basis of the foregoing facts, held:

> In this case the plaintiffs and the members of their gang did discover and realize the danger. Further, the shipowner could reasonably have expected that the longshoremen would have discovered the unsecured beams and would have protected themselves by removing all of those beams or by fastening them.

Pet. App. 9a. Removal of the beams was within the scope of the stevedore's duties. It was the expert in discharging cargo. Since the stevedoring company in full control of the discharging neither removed the beam nor complained to the ship's crew (Pet. App. 2a-3a), the natural inference is that the stevedore did not believe the unfastened beam posed an unreasonable risk to the longshoremen working in the hold. To require vessel owners to second-guess stevedores under these circumstances would be totally inconsistent with the view, frequently stated in post-Amendment cases, that a vessel owner is under no obligation to supervise the operations of a competent stevedore hired as an independent contractor. *See Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal. 1974); *Slaughter v. SS RONDE*, 390 F. Supp. 637, 646-47 (S.D. Ga. 1974),

*aff'd,* 509 F.2d 973 (5th Cir. 1975); *Citizen v. M/V TRITON,* 384 F. Supp. 198, 201 (E.D. Tex. 1974); *Fedison v. Vessel WISLICA,* 382 F. Supp. 4, 6 (E.D. La. 1974); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.,* 379 F. Supp. 759, 768 (E.D. Pa. 1974). The same principle had been expressed as well in pre-Amendment cases. *See Shephard v. SS NOPAL PROGRESS,* 497 F.2d 963, 965 (5th Cir. 1974), *cert. denied,* 420 U.S. 937 (1975); *Filipek v. Moore-McCormack Lines,* 258 F.2d 734, 739 (2d Cir. 1958), *cert. denied,* 359 U.S. 927 (1959); *Wyborski v. Bristol City Line of Steamships, Ltd.,* 191 F. Supp. 884, 889-90 (D. Md. 1961).

Just as the Second Circuit in *Napoli* recognized the correctness of instructing a post-Amendment jury under traditional rules of land-based negligence, 536 F.2d at 508, District Judge Kaufman applied the same traditional rule and found that the danger was open and obvious, that it was known to Petitioners, and that Respondent reasonably believed they would protect themselves accordingly. The Fourth Circuit approved the district court's choice of the Restatement standard and found that "its ultimate finding and conclusion upon the issue of liability is amply supported by the record." Pet. App. 24a. As the standards applied by the Second and Fourth Circuits are identical, there is no conflict between the two opinions.

2. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT MADE NO MISSTATEMENT OF FACTS IN REACHING ITS DECISION.

In rendering its *per curiam* affirmance of the district court, it was unnecessary for the appellate court to repeat each and every fact found by the lower court. In approving the district court's reliance on the Restatement (Second) of Torts § 343 (1965), the court of appeals necessarily took into account that the vessel owner was aware of the condition of the beams which might bring



about injury, but that under the amended Longshoremen's Act there was no duty on the part of the shipowner to take any action respecting them when it was quite apparent that the danger would not only be discovered by the stevedore but was, indeed, discovered and was of the stevedore's own creation when it elected to remove only three of the four beams in the hatch.

3. THE DECISION BELOW DOES NOT UNDERMINE COMPLIANCE WITH APPROPRIATE SAFETY REGULATIONS.

Petitioners contend that the opinion below imposes no duty on vessel owners to correct violations of the Safety and Health Regulations for Longshoring, 29 C.F.R. §§ 1918.1 *et seq.* (1976). However, the Safety and Health Regulations for Longshoring do not impose any duties upon, and are inapplicable to, shipowners. They apply only to stevedoring employers as more fully shown by a close examination of the Longshoremen's Act, the regulations and case law. Section 41 of the Longshoremen's Act, concerning Safety Rules and Regulations, states:

> (a) Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees.

33 U.S.C. § 941(a) (1970). The term "employee," however,

> does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 902(3) (1976 Supp.). When a stevedore is hired as an independent contractor to load and/or unload a vessel, its longshoremen/employees are not employees of the vessel. In the normal situation, the only employees of the vessel present while longshoring operations are in progress are members of the ship's crew. These individuals, however, are not "employees" within the meaning of the Longshoremen's Act. Since the "term 'employer' means an employer any of whose employees are employed in maritime employment," 33 U.S.C. § 902(4) (1970), a vessel is not an "employer" within the meaning of the Act unless it hires longshoremen directly, bypassing an independent contractor.

This proposition was recognized by the Labor Department when it promulgated the Safety and Health Regulations for Longshoring pursuant to the Act. The relevant parts of the Regulations state:

> § 1918.2 *Scope and responsibility.*
>
> (a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1918.3(c).
>
> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.
>
> § 1918.3 *Definitions.*
>
> . . . .
>
> (c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction of the navigable waters of the United States.

29 C.F.R. §§ 1918.2-.3 (1976).



Despite the foregoing unambiguous statutory provisions, however, Petitioners nevertheless insist that the duty to enforce the regulations falls upon the shipowner, relying on *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561 (5th Cir. 1973). Such reliance is misplaced. Since Arthur's injury occurred in 1969, the 1972 Amendments to the Longshoremen's Act were not governing. Furthermore, Arthur alleged both negligencce and unseaworthiness. In the period following *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946),[2] the previously independent concepts of unseaworthiness and negligence became hopelessly confused and intertwined. One post-Amendment decision issued a caveat concerning this very problem: "Pre-amendment cases . . . must be read with care, as they often reflect the rationale of the warranty of seaworthiness even when talking in terms of a negligence standard." *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal. 1974). This notorious confusion in cases decided between 1946 and 1972 militates against reliance on any case which, like *Arthur*, was decided without reference to the 1972 Amendments to the Longshoremen's Act.

### 4. THE DECISION BELOW DOES NOT CONFLICT WITH THE FOURTH CIRCUIT'S EARLIER DECISION IN *BESS v. AGROMAR LINE*, 518 F.2d 738 (4TH CIR. 1975).

Petitioners urge this Court to read into the *Bess* case the notion that negligence standards were unchanged by the 1972 Amendments. Such a suggestion is patently inaccurate. There are no reported decisions which disagree with the clear intent of Congress, as stated in the legislative history, that land-based standards are to be applied in measuring the duty now owed by shipowners to longshoremen. *See* The Report of the House Committee on Education and Labor, H.R. Rep.

[2] *Sieracki* extended the shipowner's warranty of seaworthiness to longshoremen.

No. 92-1441, U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess. 4698, 4702-03 (1972) (hereinafter House Report). In fact, the Fourth Circuit in *Bess* explicitly adopted land-based standards. *See also Birrer v. Flota Mercante Grancolombiana,* 386 F. Supp. 1105 (D. Ore. 1974); *Ramirez v. Toko Kaiun K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974); *Shellman v. United States Lines Operators, Inc.,* 1975 A.M.C. 362 (C.D. Cal. 1974), *rev'd on other grounds,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1976); *Citizen v. M/V TRITON,* 384 F. Supp. 198 (E.D. Tex. 1974); *Slaughter v. SS RONDE,* 390 F. Supp. 637 (S.D. Ga. 1974), *aff'd,* 509 F.2d 973 (5th Cir. 1975); *Fedison v. Vessel WISLICA,* 382 F. Supp. 4 (E.D. La. 1974); *Hite v. Maritime Overseas Corporation,* 380 F. Supp. 222 (E.D. Tex. 1974); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.,* 379 F. Supp. 759 (E.D. Pa. 1974).

The *Bess* case was fully briefed to the Fourth Circuit below. Petitioners suggested then, as they do here, that the *Bess* footnote, 518 F.2d 738, 740n.5, called for application of pre-Amendment maritime negligence standards. Respondent replied then, as it does here, that *Bess* clearly adopted land-based standards. *Id.* at 741. In its decision below, the Fourth Circuit resolved this potential conflict by reaffirming land-based standards (Pet. App. 22a-23a) without any reference to pre-Amendment maritime cases. To interpret *Bess* as Petitioners now suggest would only revive a potential inconsistency already resolved once and for all by the Fourth Circuit.

5. THE DECISION BELOW IS IN ACCORD WITH THE MAJOR PRINCIPLES UNDERLYING THE 1972 AMENDMENTS.

In asserting that the Fourth Circuit's opinion "fails to conform to the principles announced by the drafters of the Amendments to the LHWCA" (Br. p. 12), Petitioners rely on the so-called "oil spill example" in the



legislative history. *See* House Report at 4704. In the district court below, Judge Kaufman forcefully and properly rejected any reliance on the example, which he found in total discord with the remainder of the legislative history. To allow recovery herein would, Judge Kaufman held, contravene land-based rules of negligence and open wide the door

> for the longshoremen to recover for shipowners' negligence on a basis that is not available against land or building owners to employees of independent contractors who do work on such land and/or in such buildings. . . . In that context, the possible or literal word-for-word application of one illustration in the House Report may not prevail.

Pet. App. 12a-13a. This is particularly true where, as in this case, the dangerous condition is created by the stevedore in the course of performing its contractual duties.

6. THE OPINION BELOW DOES NOT CREATE A DEFENSE BASED ON ASSUMPTION OF RISK.

Petitioners attack the "open and obvious" rule by stating that it is tantamount to adopting the doctrine of assumption of risk, which Petitioners correctly point out was rejected as a defense in the Committee reports. The attempt fails for two reasons.

First, Petitioners have totally ignored the essence of "assumption of risk." By its very nature, it is a *defense.* Dean Prosser, for example, includes the subject in his treatise in a chapter entitled "Negligence: Defenses." Prosser, *The Law of Torts* ch. 11, § 68 (4th ed. 1971). He described assumption of risk as follows:

> In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him. . . . The result is that the defendant is relieved of all legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.

*Id.* § 68, at 440.

The "open and obvious" rule does not relieve shipowners of any and all duty toward longshoremen. Rather, it simply recognizes the obvious fact that there is no point in requiring a landowner to warn an invitee about something which is perfectly apparent to the invitee. Thus, the landowner does not escape liability because the invitee has assumed the risk of the landowner's negligence, but rather because reasonable men would not warn business invitees on their property about obvious dangers. No duty has been breached. The Respondent in this case never suggested that, had it been found negligent, it would have nonetheless been entitled to escape liability because the Petitioners assumed the risk of harm, thus forefeiting all their rights. That is not the law. That does not mean to say, however, that the shipowner should thereby be held to a higher standard of care. The plain fact is the district court held that this Respondent was *not* negligent under post-Amendment standards, and the Fourth Circuit affirmed. That being the case it is irrelevant to consider an affirmative defense to negligence.

Second, to accept Petitioners' assertions would directly conflict with the reasoning of Judge Kaufman below, just discussed, that minor inconsistencies in the legislative history cannot overturn the obvious intent of the 1972 Amendments in adopting land-based standards. That, in effect, is what Petitioners now ask this Court to do, for the "open and obvious" standard is recognized as the rule defining the *duty* owed by landowners to business invitees. What Congress rejected was "the *defense* of assumption of risk." House Report at 4705 (emphasis added). Any technical inconsistency noted by Petitioners cannot override the clear intent of Congress.



### 7. *KERMAREC v. COMPAGNIE GENERAL TRANSATLANTIQUE*, 358 U.S. 625 (1959), HAS NO BEARING ON THIS CASE.

Petitioners contend that *Kermarec* dictates application of a more stringent duty than is owed under land-based standards. While it is doubted that the *Kermarec* standard is altogether inconsistent with the standard applied below, that question is completely moot. It is fundamental that federal statutes displace inconsistent substantive judicial principles. Therefore, when Congress adopted the 1972 Amendments to the Longshoremen's Act, it simultaneously rendered obsolete all prior cases setting forth inconsistent standards. Indeed, *Kermarec* recognized this very point, for after stating that the "issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts," 358 U.S. at 630, Mr. Justice Stewart, writing for the unanimous Court, added in a footnote *"[w]here there is no impingement upon legislative policy." Id.* at 630n.5 (emphasis supplied).

The 1972 Amendments to the Longshoremen's Act provide the sole remedy for longshoremen injured on board vessels. The duty owed by such vessels is measured by the standards adopted in the statute. No pre-Amendment case inconsistent with those standards, even though decided by the highest court of the land, can be properly cited as the controlling rule of law.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 1, 1977

## APPENDIX

# APPENDIX

## STATEMENT OF THE FACTS
(Taken from Brief of Appellants [Petitioners herein] filed in Court of Appeals for the Fourth Circuit)

*The following statement of the facts, which in some instances goes beyond the actual evidence adduced at the trial (e.g., certain particulars of the vessel from Lloyd's Register of Ships) is an agreed statement by the parties to this appeal.*

The accident which is the subject matter of this litigation occurred on February 18, 1973 in the No. 1 lower hold of the M/V TARPONA, owned and operated by Dynamic Mariners Corp. The TARPONA was built in Kobi, Japan, in 1951. Her length overall is 473′ 5″; her extreme breadth is 61′ 8″. She is a general cargo vessel of 8,068 gross tons, 4,490 net tons, with six holds served by six hatches. She was of Panamanian registry; her crew was Chinese (Lloyd's Register of Ships; App. 2; 25; 43).

The cargo spaces in the vessel's No. 1 hatch consisted of an upper tween deck, lower tween deck and lower hold. At the main, or weather, deck level the hatch was covered by folding MacGregor hatch covers (Defendant's Exhibit 1-D, App. 31); at the upper and lower tween deck levels, the hatch coverings consisted of fore and aft hatch boards resting on four athwartships beams weighing approximately one ton each. (Court's Exhibit No. 1, App. 22; Defendant's Exhibits 1-A and 1-C, App. 23 and 24; App. 25; 28-29; 52). The hatchway, or opening, at the main deck level was 19′ in length, 20′ in width (Lloyd's Register of Ships).

In Keelung, Taiwan, the TARPONA had loaded a full cargo for discharge in various ports. Prior to arrival in the Port of Baltimore, she had discharged cargo in the Port of New York on February 15, 1973, from her No. 1 upper tween deck. The discharging stevedore in New York was Maher Terminals, Inc., which is neither connected nor affiliated with the discharging stevedore

in Baltimore, Nacirema Operating Co., Inc. Upon sailing from New York for Baltimore, the vessel's No. 1 upper tween deck was empty.

The TARPONA anchored in Baltimore Harbor at 1822 hours, February 16, 1973, preparatory to discharging the Baltimore cargo which, in her No. 1 hatch, was all contained in the lower tween deck and lower hold. She departed from the anchorage at 0655 hours on February 17, 1973, and proceeded to dock at the west side of Pier 9, Locust Point, Port of Baltimore, at 0734 hours (App. 2; 25; 26; February 17 hatch report, Defendant's Exhibit 4, Tr. 9; stowage plan, Defendant's Exhibit 6, Tr. 9; vessel's long abstract, Defendant's Exhibit 7, Tr. 9).[3]

On February 17, 1973, gang carrier John Brokos and 23 longshoremen, all employees of Nacirema Operating Co., Inc., boarded the TARPONA at 0800 hours and proceeded to the No. 1 hatch where they rigged and uncovered until 0830 hours when the actual discharging of cargo commenced. Both appellants Anuszewski and Gutowski were members of Brokos' gang and, with certain other members of the gang, participated in the rigging and uncovering operation. There is some question as to whether the longshoremen found the hatch open at the main deck level upon arrival aboard the vessel, or whether they themselves actually opened the MacGregor hatches in order to gain access to the hatch; however, the resolution of the question is immaterial since it is undisputed that the members of the gang did enter the upper tween deck and removed the hatch boards in the square of the hatch in order to gain access to the Baltimore cargo in the lower tween deck and, subsequently, the lower hold (App. 2; 25-26; 28; 46-48; 51; February 17 hatch report, Defendant's Exhibit 4, Tr. 9).

When the longshoremen had removed the hatch boards at the upper tween deck level in order to gain access to the Baltimore cargo in the lower tween deck,

[3] Reference to pages of the Appendix are (App. followed by page numbers) reference to pages of the Transcript not reproduced in the Joint Appendix are (Tr. followed by the page number).



they noted that there were four athwartships hatch beams at the upper tween deck level. These beams, although equipped for locking devices consisting of pins similar to 6" threaded bolts and nuts, were not locked in the slots into which they fit nor were they otherwise secured in any manner (see photographs, Defendant's Exhibits 1-A and 1-C, reproduced in the Appendix at pp. 23 and 24). Neither locking devices, nor rope for lashing, was in the immediate vicinity of the unsecured beams. Upon orders of the gang carrier and ship foreman, both stevedore employees, the winchman, likewise a stevedore employee, removed the three aftermost hatch beams, leaving the forward beam in place.

The longshoremen had discussed the absence of any means of securing the beams in place among themselves and had, in fact, complained to their gang carrier and ship foreman, both stevedore employees. The stevedore's safety man was not aboard. The ship foreman told the men to continue to work and that the situation would be corrected; however, throughout February 17 and February 18 until the time of the accident, the situation was not corrected and the forward beam in the lower tween deck was never secured in place in any manner (App. 3-4, 33, 42, 50, 53).

On February 17, 1973, the gang members discharged all of the cargo from the lower tween deck. Later the same day, they proceeded to remove the hatch covers from the lower tween deck hatch square in order to discharge cargo from the lower hold. Again, there were four athwartships hatch beams in place similarly unsecured in the slots in which they rested. Again, the three aftermost beams were removed by the winchman and the forward beam was left in place. The longshoremen then proceeded to discharge some of the cargo from the lower hold and completed work that day at 5:00 P.M. after having discharged a total of 85 tons of cargo from the lower tween deck and lower hold.

On February 18, 1973, the same gang of longshoremen returned to the TARPONA and continued to discharge the cargo from the vessel's No. 1 lower hold. Work commenced at 8:00 A.M. and continued through-

out the day until all cargo was discharged from the lower hold by 3:30 P.M. In the meantime, however, at 9:50 A.M. while a pallet was being discharged from the lower hold, the cargo hook which was attached to the ship's fall caught beneath the forward beam in the lower tween deck, dislodged it, and caused it to fall approximately ten (10) feet into the vessel's lower hold striking Gutowski and Anuszewski (App. 2-3; 25-26; 28-30; 33-35; 42; 46-47; 52-54; 67; February 17 and 18 hatch reports, Defendant's Exhibits 4 and 5, Tr. 9; Stowage Plan, Defendant's Exhibit 6, Tr. 9; vessel's log abstract, Defendant's Exhibit 7, Tr. 9).

There was a Nacirema gear locker within a half block of the vessel where rope, and probably nuts and bolts, could have been obtained for use in fastening the beams in place. There was a nearby chain locker aboard the vessel which contained items which could have been used to fasten the beams in place. A member of the ship's crew was present in the No. 1 hatch on February 17 and February 18 for the purpose of preventing pilferage. Also, other members of the crew and ship's officers were in the vicinity of the No. 1 hatch and were able to see that the beams were not secured. No one from the vessel was asked to correct the situation (App. 4, 33, 35-38, 44, 53, 66).